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No. 93-919

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LINDA WHITMORE,

Petitioner,

v.

BOARD OF EDUCATION OF DeKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a petition for writ of certiorari should be granted to review a district court's exercise of its discretion under Federal Rule of Civil Procedure 60(b)(6) in denying a motion seeking relief from a judgment on the ground that the district court's finding that the petitioner had no property interest in continued employment was contrary to a previous order which had been vacated.

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No. 93-919

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LINDA WHITMORE,

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v.

BOARD OF EDUCATION OF DeKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President of Board of Education School District No. 428, Individually, BERNARD LOONEY, Principal, Individually, DR. JACK DEERE, District Superintendent, Individually, KEN KENNEDY, Assistant Principal, Individually, and ROBERT WILLIAMS, Assistant Superintendent, Individually,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully pray that this Honorable Court deny the petition for writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on August 4, 1993. The court's unpublished opinion is set forth in the Appendix to this brief (App. 7-12). The order affirming the district court is reported in a Table of Decisions Without Published Opinions at 1 F.3d 1245 (7th Cir. 1993).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves application of Federal Rule of Civil Procedure 60(b). In addition, U.S. Const. amend XIV, § 1; 42 U.S.C. § 1983; and paragraph 24-11 of the Illinois School Code, Ill. Rev. Stat. ch. 122, para. 24-11 (1989), recodified as 105 ILCS 5/24-11 (1992), are involved in that the underlying claim is predicated thereon. (App. 1-6)

Insofar as the petition cites constitutional provisions and federal statutes relating to petitioner's claims under the First and Ninth Amendments to the United States Constitution, 42 U.S.C. § 1985, and 42 U.S.C. § 2000e-2(a), those claims have been abandoned and those provisions are not involved in this case. (Pet. at 2-3)

STATEMENT OF THE CASE

The petition does not accurately reflect the case which is before this court. As this case now stands, the sole remaining claim at issue contends that petitioner had a protectable property interest in continued employment—commonly known as tenure—and that her dismissal by the respondents without notice or a hearing denied her due process. Petitioner did not perfect an appeal from the order entering summary judgment in favor of the respondents on all her claims, and limited her contentions in the appeal from the denial of her motion for reconsideration to her due process claim. Accordingly, petitioner's equal protection and Title VII claims are no longer at issue,

and the facts and circumstances regarding her pregnancy or unmarried status are immaterial to the issue before this Court concerning the denial of her motion under Federal Rule of Civil Procedure 60(b)(6).

Petitioner's Employment History

Moreover, petitioner's statement that she was never notified of any deficiency in her performance prior to her dismissal is incorrect. Petitioner was employed in 1987 by the respondent, the Board of Education of DeKalb Community School District No. 428, as a probationary teacher, and rehired—again on probationary status—for an additional year. During her probationary period petitioner was evaluated six times. The evaluations noted several deficiencies regarding petitioner's lack of enthusiasm, slow pacing, and failure to motivate students. Those evaluations and cited problems were reviewed and discussed with petitioner in post-evaluation conferences. Petitioner's final performance rating in 1989 was the worst of all second-year probationary teachers, and again noted deficiencies relating to lack of enthusiasm, slow pacing and failure to motivate. On March 20, 1989, the respondent Board of Education voted not to rehire six probationary teachers, including the petitioner, and notified petitioner by letter that her contract would not be renewed "because the performance of your duties has failed to meet the district's expectations."

The Proceedings And Rulings Below

Petitioner filed a multi-count complaint seeking damages predicated upon the Board's vote not to renew her teaching contract. Respondents moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the due process claim

on the basis that petitioner, as a probationary teacher, had no property interest in continued employment under Illinois law. On that issue the district court initially found that the respondents did not provide petitioner with specific reasons for her termination as required by Illinois law, and that petitioner therefore had tenure. Respondents filed exceptions to those findings as premature on a motion pursuant to Federal Rule of Civil Procedure 12(b)(6), and asserted that they were entitled to present evidence that petitioner's performance evaluations provided the statutorily-required notice of the reasons for petitioner's dismissal. Accordingly, the district court struck its original order and entered a modified order which deleted the findings regarding the sufficiency of the termination notice and petitioner's tenure status. (Pet. App. at 42-71)

Subsequently petitioner and respondents moved for summary judgment pursuant to Federal Rule of Civil Procedure 56 on the question whether petitioner had acquired tenure, and thereby a protectable property interest. In support of their motion the respondents submitted evidence that the petitioner had received specific notice of the reasons for her termination through her performance evaluations. On March 19, 1992, the district court ruled that the petitioner in fact had *not* acquired tenure, granted summary judgment to respondents on all claims, and denied petitioner's cross-motion for partial summary judgment. (Pet. App. at 72-98)

Petitioner did not appeal the summary judgment order within 30 days under Federal Rule of Appellate Procedure 4(a). Instead, petitioner filed a "motion to reconsider" portions of the summary judgment order pursuant to Federal Rule of Civil Procedure 60(b), particularly its finding that she did not have tenure. On June 9, 1992, the district

court denied the motion. Petitioner filed a notice of appeal on June 17, 1992, from both the summary judgment order and the order denying her motion under Federal Rule of Civil Procedure 60(b). The Court of Appeals dismissed petitioner's tardy appeal from the summary judgment order for lack of jurisdiction, stating "[t]his appeal may proceed on review of the denial of plaintiff-appellant's Rule 60(b) motion only." (App. 14)

With respect to petitioner's motion under Rule 60(b), the Court of Appeals considered only whether the district court abused its discretion in denying the motion. (App. 10) The Court noted that the petitioner misconstrued the issue before it and its limited scope of review:

> "Whitmore fails to argue on appeal what she needs to show: that the district court abused its discretion. Instead, she appears to be challenging the district court's order granting summary judgment, presenting her arguments as though this court were engaged in *de novo* review of a question of law." (App. 11)

The Court held that the district court neither committed an error of law nor exceeded its permissible bounds of judgment in denying petitioner's motion, and therefore did not abuse its discretion. (App. 10)

In addition the Court noted that petitioner's argument that the motion for reconsideration stated "exceptional circumstances" based on the fact that the judge who entered summary judgment reached a "different conclusion" regarding her tenure status than the district judge who presided over the motion to dismiss, failed to meet the rigorous standards for relief under Federal Rule of Civil Procedure 60(b), and was predicated on the mistaken belief that the two judges were engaged in the same type of review. (App. 11)

REASONS FOR DENIAL OF THE WRIT

I.

THERE ARE NO SPECIAL OR IMPORTANT REASONS TO REVIEW THE DECISION OF THE COURT OF APPEALS THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION, UNDER THE CIRCUMSTANCES OF THIS CASE, IN DENYING PETITIONER'S MOTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6)

Petitioner seeks a writ of *certiorari* to the Court of Appeals to review its opinion affirming the order of the district court denying her motion, under Federal Rule of Civil Procedure 60(b)(6), to reconsider a prior order wherein it found that petitioner did not have a property interest under state law. The sole issue in the Court of Appeals was whether the district court had abused its discretion in denying that motion, wherein petitioner alleged that a preceding presiding judge had entered—then vacated—a contrary finding on the same issue. This case does not present any special or important reasons to review its judgment on that issue, and in any event the Court of Appeals correctly held that district court did not abuse its discretion because the motion for reconsideration did not demonstrate "exceptional circumstances" as required by Rule 60(b)(6).

Manifestly this case does not present any "special and important reasons" for granting a writ of *certiorari* as described in Rule 10 of the rules of this Court, or otherwise. There are no conflicting decisions of the courts of appeals, and no conflict with any applicable decision of this Court. The question whether the district court abused its discretion under Rule 60(b)(6), under the circumstances of this case, involves no question of substantive law. The

district court's exercise of its discretion turned upon the unique facts before it on the motion to reconsider. In essence the petition asks this court to conduct *de novo* review of her motion for reconsideration, and to extend no deference to the district court judge who reviewed the evidence on the motions for summary judgment, and who was in the best position to determine whether exceptional circumstances existed which warrant relief from that judgment. Moreover, to the extent that the petition argues that summary judgment was erroneously granted to the respondents, that order is not the subject of this appeal.

II.

THE JUDGMENTS BELOW DO NOT IMPAIR FEDERAL OR STATE PUBLIC POLICY

In an effort to create a special or important reason for granting her petition, petitioner argues that *certiorari* should be granted to uphold federal and state public policy embodied in the Family and Medical Leave Act of 1993 (5 U.S.C. §§ 6381-6387) and the Illinois School Code (105 ILCS 5/1-25 (1992)).

As previously noted, the Court of Appeals' review was limited to determining whether the order denying the Rule 60(b) motion constituted an abuse of discretion. (App. 10) Manifestly the limited scope of its holding that there was no abuse of discretion does not, expressly or impliedly, impair such statutory laws or their underlying public policy.

Petitioner's public policy argument improperly focuses on a ruling that was *not* before the Court of Appeals—the finding in the underlying summary judgment order that she lacked tenure under Illinois law. While that order was not before the Court of Appeals, the record nonetheless refutes petitioner's contention.

The district court demonstrated that it was fully cognizant of applicable Illinois School Code provisions and case authorities, and that the efficacy of petitioner's claim turned on whether she was given "specific reasons" for her dismissal. (Pet. App. at 82-86) Its conclusion that the circumstances of this case, viewed in their entirety, complied with Illinois law, plainly turned on those facts. Since the court analyzed those facts under the proper legal standard, its ruling does not impair the "balance" established by the state tenure laws.

Nor does the public policy embodied in the Family and Medical Leave Act have any bearing on petitioner's claim that the procedures followed by the respondents in dismissing her were defective under Illinois law. Resolution of *that* issue has nothing whatsoever to do with the Act's policy of protecting the employment security of employees who take maternal or pregnancy leave. As the petitioner has abandoned or waived all claims that she was discriminated against on account of her pregnancy, she cannot invoke public policy regarding pregnancy leave as a ground for granting a writ of *certiorari* in this case.

Moreover, even if petitioner had preserved her pregnancy-based claims, petitioner concedes the Family and Medical Leave Act of 1993 would have no bearing on her challenge to the Board's decision in 1989 not to renew her teaching contract. In essence petitioner invites this Court to issue a writ of *certiorari* so that it can issue an advisory opinion to school districts on an issue that does not—and could not—exist in this case.

III.

THE ORDER OF THE DISTRICT COURT WAS CORRECT AND PROPERLY AFFIRMED BASED ON THE LACK OF EXCEPTIONAL CIRCUMSTANCES TO WARRANT THE GRANTING OF RELIEF UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6)

The petition should be denied for the additional reason that the judgments below were manifestly correct as petitioner's motion under Federal Rule of Civil Procedure 60(b)(6) set forth no "exceptional circumstances" which warranted relief from the judgment. The motion sought relief due to what the petitioner describes as "diametrically opposite conclusions" on whether petitioner had acquired tenure by two different judges who presided in this case in the district court. (Pet. at 18) As the Court of Appeals correctly noted, those grounds fail to satisfy the rigorous grounds for relief under Rule 60(b). (App. 10)

The first ruling was entered by the first district court judge who presided over the respondents' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Specifically relying on the allegations in the complaint in support of petitioner's tenure-based claim, the court made an initial finding to the effect that respondents did not provide sufficiently specific reasons for not renewing petitioner's contract, and that petitioner therefore had acquired tenure. (Pet. App. at 22)

Respondents filed exceptions to the finding that petitioner was tenured as premature and inappropriate on a motion under Rule 12(b)(6), and because they were entitled to present evidence that petitioner's performance evaluations provided actual notice of her teaching deficiencies and the reasons for her termination. Based thereon

the court modified its order and vacated the disputed finding. (Pet. App. at 52)

Subsequently both petitioner and respondents moved for summary judgment on the issue of whether petitioner had tenure. Those motions were heard by a successor district court judge, to whom this case had been reassigned. After reviewing the stipulated facts, exhibits and evidence that petitioner's deficiencies were noted in her performance evaluations, that petitioner was repeatedly told of problems that needed to be corrected, and that her final performance rating was the worst of all final-year probationary teachers, the court found, "based on the prior evaluations of [petitioner]" and the actual notice of deficiencies in those evaluations, that the respondents had dismissed petitioner in accordance with Illinois law and no tenure was conferred. (Pet. App. at 84-85)

Respondents respectfully submit that petitioner's argument that the two judges were engaged in the same standard of review and had reviewed the same facts (Pet. at 17-18) is contrary to law and the record, and is refuted by the orders. The Court of Appeals aptly summarized the fallacy of petitioner's contention:

> The two judges, first of all, were not engaged in the same type of review. So it is not surprising that they could have reached "different conclusions." The first judge considered the [respondents'] motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The second judge entertained the [respondents'] motion for summary judgment. A court's consideration of whether a complaint states a legal claim versus its determination whether the absence of a material issue of fact entitles a party to judgment easily can lead to different conclusions. Many a complaint—this one, for instance—clears the hurdle of

> a Rule 12(b)(6) motion only to succumb to a motion for summary judgment. If one judge happens to deny the 12(b)(6) motion and another grants summary judgement, neither one nor the other need have reached "the wrong result." (App. 11)

Similarly, the argument at pages 19-23 of the petition that the courts below failed to properly distinguish the facts of this case from the facts of other cases which involved claims of "tenure" again assumes, incorrectly, that the summary judgment order is the subject of this appeal. Petitioner's argument that this case is distinguishable from *Howard v. Board of Educ. of Freeport Sch. Dist. No. 145*, 160 Ill. App. 3d 309, 513 N.E.2d 545 (1987), *may* have been pertinent had petitioner taken a direct appeal from the summary judgment order. As previously established, petitioner did not appeal that order. As noted by the Court of Appeals, if petitioner wished to challenge the district court's application of law in entering summary judgment, she should have filed a direct appeal in a timely manner. (App. 12) Consequently, the aforementioned argument is immaterial to whether the district court abused its discretion under Rule 60(b)(6) and cannot support a writ of *certiorari* to review a ruling on that distinct issue.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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United States Constitution
Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code — Title 42

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Illinois Revised Statutes
chapter 122, section 24-11

24-11. Boards of education—Boards of school inspectors—Contractual continued service

§ 24.11. Boards of Education—Boards of School Inspectors—Contractual continued service. As used in this and the succeeding Sections of this Article, "teacher" means any or all school district employees regularly required to be certified under laws relating to the certification of

teachers, "board" means board of directors, board of education or board of school inspectors, as the case may be, and "school term" means that portion of the school year, July 1 to the following June 30, when school is in actual session. This Section and Sections 24-12 through 24-16 of this Article apply only to school districts having less than 500,000 inhabitants.

Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by certified mail, return receipt requested by the employing board at least 60 days before the end of such period. For the purpose of determining contractual continued service, the first probationary year shall be any full time employment from a date before November 1 through the end of the school year. If, however, a teacher has not had one school term of full-time teaching experience before the beginning of such probationary period, the employing board may at its option extend such probationary period for one additional school term by giving the teacher written notice by certified mail, return receipt requested at least 60 days before the end of the second school term of the period of 2 consecutive school terms referred to above. Such notice must state the reasons for the one year extension and must outline the corrective actions which the teacher should take to satisfactorily complete probation.

Any full-time teacher who is completing the first year of the probationary period described in the preceding paragraph, or any teacher employed on a full-time basis not later than January 1 of the school term, shall receive written notice from the employing board at least 60 days before the end of any school term whether or not he will be re-employed for the following school term. If the board fails to give such notice, the employee shall be deemed reemployed, and not later than the close of the then current school term the board shall issue a regular contract

to the employee as though the board had reemployed him in the usual manner.

Contractual continued service shall continue in effect the terms and provisions of the contract with the teacher during the last school term of the probationary period, subject to this Act and the lawful regulations of the employing board. This Section and succeeding Sections do not modify any existing power of the board except with respect to the procedure of the discharge of a teacher and reductions in salary as hereinafter provided. Contractual continued service status shall not restrict the power of the board to transfer a teacher to a position which the teacher is qualified to fill or to make such salary adjustments as it deems desirable, but unless reductions in salary are uniform or based upon some reasonable classification, any teacher whose salary is reduced shall be entitled to a notice and a hearing as hereinafter provided in the case of certain dismissals or removals.

The employment of any teacher in a program of a special education joint agreement established under Sections 3-15.14, 10-22.31 or 10-22.31a shall be under this and succeeding Sections of this Article. For purposes of attaining and maintaining contractual continued service and computing length of continuing service as referred to in this Section and Section 24-12, employment in a special educational joint program shall be deemed a continuation of all previous certificated employment of such teacher for such joint agreement whether the employer of the teacher was the joint agreement, the regional superintendent, or one of the participating districts in the joint agreement.

Any teacher employed after July 1, 1987 as a full-time teacher in a program of a special education joint agreement, whether the program is operated by the joint agreement or a member district on behalf of the joint agreement, for a probationary period of two consecutive years shall enter upon contractual continued service in all of the programs conducted by such joint agreement which the

teacher is legally qualified to hold. In the event of a reduction in the number of programs or positions in the joint agreement, the teacher on contractual continued service shall be eligible for employment in the joint agreement programs for which the teacher is legally qualified in order of greater length of continuing service in the joint agreement unless an alternative method of determining the sequence of dismissal is established in a collective bargaining agreement. In the event of the dissolution of a joint agreement, the teacher on contractual continued service who is legally qualified shall be assigned to any comparable position in a member district currently held by a teacher who has not entered upon contractual continued service or held by a teacher who has entered upon contractual continued service with shorter length of contractual continued service.

The governing board of the joint agreement, or the administrative district, if so authorized by the articles of agreement of the joint agreement, rather than the board of education of a school district, may carry out employment and termination actions including dismissals under this Section and Section 24-12.

For purposes of this and succeeding Sections of this Article, a program of a special educational joint agreement shall be defined as instructional, consultative, supervisory, administrative, diagnostic, and related services which are managed by the special educational joint agreement designed to service two or more districts which are members of the joint agreement.

Each joint agreement shall be required to post by February 1, a list of all its employees in order of length of continuing service in the joint agreement, unless an alternative method of determining a sequence of dismissal is established in an applicable collective bargaining agreement.

The employment of any teacher in a special education program authorized by Section 14-1.01 through 14-14.01,

or a joint educational program established under Section 10-22.31a, shall be under this and the succeeding Sections of this Article, and such employment shall be deemed a continuation of the previous employment of such teacher in any of the participating districts, regardless of the participation of other districts in the program. Any teacher employed as a full-time teacher in a special education program prior to September 23, 1987 in which 2 or more school districts participate for a probationary period of 2 consecutive years shall enter upon contractual continued service in each of the participating districts subject to this and the succeeding Sections of this Article, and in the event of the termination of the program shall be eligible for any vacant position in any such districts for which such teacher is qualified.

Federal Rule of Civil Procedure 60
Relief from Judgment or Order
Subdivision (b)

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered

or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 53]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued July 7, 1993

Decided August 4, 1993.

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

LINDA WHITMORE,

Plaintiff-Appellant,

No. 92-2442 *v.*

BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 90 C 20143—Philip G. Reinhard, *Judge.*

ORDER

Linda Whitmore appeals from the district court's denial of her motion to reconsider under Federal Rule of Civil Procedure 60. We affirm.

I

Whitmore, a high school teacher, sued the DeKalb school board and various school district officials after the board voted not to renew her contract. She sought relief pursuant to 42 U.S.C. §§ 1983, 1985, 2000e-h, as well as under state law for intentional infliction of emotional distress.

The district court granted in part and denied in part the defendants' motion under Federal Rule of Civil Procedure 12(b)(6). Initially, the court found that Whitmore had not received sufficiently specific reasons for her termination. Subsequently, however, the district court vacated that order and deleted its finding that Whitmore had received tenure under state law.

Another judge took over the case and granted the defendants' motion for summary judgment as to all of Whitmore's claims. She then filed a "motion to reconsider" the summary judgment pursuant to Federal Rule of Civil Procedure 60(b), but before the time for taking a direct appeal had expired. The district court denied this motion and Whitmore appealed.

II

A motion under Rule 60(b) seeks an extraordinary remedy. *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673, 683 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983). That is especially true under Rule 60(b)(6). Although this "catch-all provision", *id.*, authorizes the district court to vacate its order or judgment for "any reason justifying relief from the operation of the judgment", Rule 60(b)(6) is not as open-ended as its language or nickname suggest. Relief is available only (1) if Rules 60(b)(1) through (5) do not apply; and (2) if the district court, in its sound discretion, finds that equitable action is necessary to accomplish

justice. *Peacock v. Board of School Comrs.*, 721 F.2d 210, 214 (7th Cir. 1983) (per curiam). These conditions will obtain only in "extraordinary circumstances that create a substantial danger that the underlying judgment was unjust." *Margoles v. Johns*, 798 F.2d 1069, 1073 (7th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1204-05 (7th Cir. 1984) ("the general rule in this circuit is that relief from a judgment under [R]ule 60(b) is an extraordinary remedy and is granted only in exceptional circumstances."). *Cf. Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489, 1497 (1993).

Our cases emphasize that Rule 60(b) is a substitute neither for direct appeal nor for a motion under Rule 59. In *Parke-Chapley Construction Co. v. Cherrington*, 865 F.2d 907 (7th Cir. 1989), for instance, Judge Cummings explained the rationale for this limitation on Rule 60(b):

> If plaintiff believed the district court was mistaken as a matter of law in dismissing the original complaint, he should have appealed . . . or he might have filed a timely motion under FRCP 59 to vacate the judgment of dismissal and for leave to amend his complaint. . . . The policy behind such a reading of FRCP 60(b) is clear; parties should not be allowed to escape the consequences of their failure to file a timely appeal by addressing questions of law to the trial court for reconsideration. That is the function of appellate courts. If allowed to raise the same questions in a FRCP 60(b) motion that would have been raised in an appeal from the merits, a party would be able to effect an indirect extension of the time for appeal by appealing the FRCP 60(b) motion within thirty days of its disposition.

Id. at 915 (quotations and citations omitted).

The function of Rule 60(b) necessarily narrows the scope of this court's review to a "most limited" consideration.

Reinsurance Company of America, Inc. v. Administratia de Stat, 902 F.2d 1275, 1277 (7th Cir. 1990). Regardless of whether "relief from the judgment might have been obtained had an appeal been taken", *Parke-Chapley Construction Co.*, 865 F.2d at 915 (quotation and citation omitted), the court may consider only whether the district court abused its discretion.[1] In the absence of extraordinary circumstances, reaching the merits of the underlying judgment is not permissible. *Lee v. River Forest*, 936 F.2d 976, 979 (7th Cir. 1991). *Brennan v. Midwestern United Life Insurance Co.*, 450 F.2d 999, 1003 (7th Cir. 1971) (court's function in reviewing the denial of a Rule 60(b) motion is "not to determine whether the court was substantively correct in entering the judgment from which relief was sought but is limited to deciding whether the judge abused his discretion . . ." in ruling that motion failed to show sufficient grounds for relief) (citations omitted), *cert. denied*, 450 U.S. 999 (1972).

Whitmore's arguments in favor of her motion fail to satisfy the rigorous standards of Rule 60(b). The district court found that Whitmore's motions contained no grounds justifying relief under subsection (1) (mistake, inadvertence, surprise, or excusable neglect), or under subsection (2) (newly discovered evidence that could not have been discovered by due diligence in time to move for a new trial). Moreover, the district court judge concluded that Whitmore was not entitled to relief under subsection (6). In reaching this conclusion, the district court neither committed an error of law nor exceeded permissible bounds of judgment.

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[1] A trial court abuses its discretion either by committing an error of law, *United States v. Barber*, 881 F.2d 345, 349 (7th Cir. 1989), *cert. denied*, 495 U.S. 922 (1990), or by exceeding the "permissible bounds of judgment." *American Hospital Supply Corp. v. Hospital Products, Ltd.*, 780 F.2d 589, 594 (7th Cir. 1986).

Whitmore fails to argue on appeal what she needs to show: that the district court abused its discretion. Instead, she appears to be challenging the district court's order granting summary judgment, presenting her arguments as though this court were engaged in *de novo* review of a question of law. Our review of the denial of a motion under Rule 60(b)(6) in certain circumstances will require us to consider the merits underlying a summary judgment. But Whitmore seems to think that there was a substantial danger that this underlying judgment was unjust because the judge who granted the summary judgment reached what her lawyer characterized at oral argument as a different conclusion than the first judge. There are at least three things wrong with this description of events.

The two judges, first of all, were not engaged in the same type of review. So it is not surprising that they could have reached "different conclusions." The first judge considered the defendants' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The second judge entertained the defendants' motion for summary judgment. A court's consideration of whether a complaint states a legal claim versus its determination whether the absence of a material issue of fact entitles a party to judgment easily can lead to different conclusions. Many a complaint—this one, for instance—clears the hurdle of a Rule 12(b)(6) motion only to succumb to a motion for summary judgment. If one judge happens to deny the 12(b)(6) motion and another grants summary judgment, neither one nor the other need have reached "the wrong result."

But the judges here did not, as Whitmore alleges, reach different legal conclusions. In granting in part and denying in part the motion under Rule 12(b)(6), the first judge initially found that Whitmore was not given sufficiently

specific reasons for her termination—a requirement under Illinois law. Accordingly, he found her to be tenured as a matter of law. In response, the defendants filed exceptions to that ruling, arguing that they were entitled to present evidence that Whitmore's evaluations provided actual notice of her deficiencies. The district court subsequently struck its original order as premature and entered an amended order that deleted the finding that Whitmore had achieved tenure. That is how matters stood when the second judge assumed control of the case. After considering the pleadings, Judge Reinhard granted summary judgment to the defendants on all claims. His decision held that under Illinois law the performance deficiencies noted in Whitmore's evaluations, in conjunction with written notice, met the statutory requirements. Accordingly, she was not tenured. This is the very same conclusion arrived at by the first judge after he recognized that he had ruled prematurely on the issue.

Third, even if Whitmore were correct that the two judges reached opposite conclusions, we fail to see how there would be a substantial danger that the last judgment necessarily would be unjust.

Unlike many of the parties in cases we see involving Rule 60(b), Whitmore was not attempting to evade the time limits of direct appeal under Rule 4(a). She filed her motion under Rule 60(b) before the 30-day period for appeal had expired. Since Whitmore in essence is seeking to challenge the district court's conclusions of law in entering summary judgment, she should have filed a direct appeal in a timely manner. Rule 60(b)(6) does not allow her attorney to undo his strategic mistakes.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 28, 1992.

Before

Hon. JOEL M. FLAUM, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

LINDA WHITMORE,

Plaintiff-Appellant,

No. 92-2442 v.

BOARD OF EDUCATION OF DEKALB COMMUNITY SCHOOL DISTRICT NO. 428, JOHN REY, President, Board of Education School District No. 428, individually, BERNARD LOONEY, Principal, individually, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 90 C 20143—Philip G. Reinhard, *Judge.*

ORDER

On consideration of the "JURISDICTIONAL MEMORANDUM" filed by plaintiff-appellant on July 10, 1992, and the "RESPONSE TO PLAINTIFF'S JURISDICTIONAL MEMORANDUM" filed by defendants-appellees on July 21, 1992,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction as to the judgment entered on March 19,

1992. Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal in a civil case be filed in the district court within 30 days of the entry of the judgment appealed. In this case judgment was entered on March 19, 1992, and the notice of appeal was filed on June 17, 1992, 58 days late; plaintiff's motion to reconsider did not affect the appeal period because a 60(b) motion does not toll the time to appeal. *See* Fed. R. App. P. 4(a)(4). The district court has not granted an extension of the appeal period, see Rule 4(a)(5), and this court is not empowered to do so, see Fed. R. App. P. 26(b).

Appellant's argument (in her responsive memorandum) that her motion for leave to file a Rule 60(b) motion was intended (and therefore should be construed) as a motion to extend time to file a late appeal, *see* Fed. R. App. P. 4(a)(5), is far-fetched. The motion requests no such relief.

Although appellant's appeal is timely as to the denial of her 60(b) motion, the appeal is dismissed to the extent that appellant seeks review of the merits judgment. This appeal may proceed on review of the denial of plaintiff-appellant's Rule 60(b) motion only.